IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 63.

ALBERTO WILL ET AL., APPELLANTS,

vs.

J. TORNABELLS & CO. ET AL., APPELLEES.

STATEMENT.

This was a suit in equity brought in the District Court of the United States for Porto Rico—a court created by section 34 of the act of Congress of April 12, 1900—in the form of a creditors' bill, wherein the bill of complaint was filed on June 23, 1902, by some of the parties now appellants (others having subsequently joined) against the members of the commercial firm of J. Tornabells & Company, whose place of business had been in the city of Mayaguez, Porto Rico, within said district, and certain other defendants as holders of, or interested in, the property which was alleged to have been fraudulently conveyed by said defendant firm. No question of the jurisdiction of the court below was raised or involved, as all the defendants were alleged to be aliens and the property involved worth many thousands of dollars (act of Congress of March 2, 1901, sec. 3).

In this brief the appellants, who were complainants below, will be referred to as the complainants, and the appellees will be referred to as defendants; while references to the pages of the record will indicate the printed pages.

The following was the substance of the allegations contained in the bill of complaint:

That before the year 1900 the defendant firm of Tornabells & Co. were indebted to each of the complainant firms in the sums represented by their several subsequent judgments, all recovered on the law side of the same court; that the dates and amounts of said respective judgments, including costs, were as follows: Will & Co., April 22, 1902, for $12,492.72; Midgeley & Sons, April 22, 1902, for $4,714.80, and Cortada & Co., January 21, 1902, for $3,431.77; and that execution had been issued upon each of said judgments and returned *nulla bona* by the marshal of said court.

That at the time of the creation of said indebtedness said firm of Tornabells & Co. owned a large amount of valuable real estate, of which they continued to own twenty-six tracts or parcels until the 2d day of May, 1900, on which day the firm executed a deed of conveyance of said twenty-six parcels to their co-defendant, Luis Aran, whereby they pretended to convey the same to him for a consideration of 167,700 pesos, provincial money (act of Congress of April 12, 1900, sec. 11); that the value of said property was more than $100,000 American gold, a description thereof being attached to the bill of complaint as an exhibit; and that said conveyance recited that of the above consideration 30,000 pesos were paid in cash and the balance was to be paid in ten yearly instalments, at the rate of 13,700 pesos per year.

That nine days after the above conveyance, that is, on May 11, 1900, defendant Luis Aran executed a mortgage upon all the valuable portion of said property, whereby fourteen of said parcels were mortgaged to defendant Baudelio Duran, to secure a pretended debt of 130,000 pesos, and five parcels were mortgaged to defendant firm of Duran &

Coll, of which the same Baudelio Duran was senior partner, to secure a pretended debt of 20,000 pesos; and that thereafter said firm of Duran & Coll remortgaged *their* said mortgage to secure a pretended debt of 6,000 pesos to defendant Valdecilla.

That at about the same time as the sale of the twenty-six parcels of land to Aran said firm of Tornabells & Co. also pretended to sell and transfer to said Aran their mercantile business in said city of Mayaguez with the large stock of merchandise belonging thereto, and said business had since been carried on in the name of said Aran, but that the members of the firm of Tornabells & Co. continued in the active control of said business, while Aran had never taken any active part in the management thereof, but had been most of the time absent from Porto Rico.

That on the 13th day of September, 1901, defendant firm of Tornabells & Co. executed a further notarial instrument, whereby it pretended to acknowledge receipt from defendant Aran of said balance of 137,700 pesos of the alleged purchase price, which was, according to the original agreement and deed, to have been paid in ten annual instalments.

That, at the time of said transfers of the real estate and personal property aforesaid by Tornabells & Co. to Aran, said firm was largely indebted, was insolvent and in suspension of payments—a condition provided for by the then laws of Porto Rico; that each and all of said transfers and subsequent liens were simulated and fraudulent and made for the purpose of hindering, delaying and defrauding the complainants and other creditors, with exception of the mortgage to Valdecilla; and that, as to that mortgage, complainants were uninformed as to its real consideration, but however that may have been, said Valdecilla had knowledge of the fraud in the title of his grantors, wherefore his rights should be postponed to those of the complainants.

The bill closed with a prayer for a receiver and for the usual relief of having the several conveyances and mortgages

described declared to be fraudulent as to creditors and the said property decreed to be subject to the lien of complainants' judgments and, if the same were not thereupon paid, of having said property sold for the payment thereof, and for general relief (Record, pages 1-6).

The several defendants filed their answers on the rule day of the court in October, 1902 (Tornabells & Co., pages 12-15; Aran, 16-20; Duran & Coll, 20, 21; Saliva, 22). These answers, generally speaking, deny the allegations of the bill, with some attempt at explanation of the various transactions, but, as most of them were later superseded by amended answers, it is not necessary to state them in detail, and whatever reference to their allegations may be advisable will be made in the argument.

After much time consumed in exceptions to answers and other proceedings not contained in the record and not material for the court to consider, a general replication was filed in October, 1904, and a few days later the firm of L. W. & P. Armstrong, of New York, filed their intervening petition praying to be allowed to join as complainants, and alleging that said firm of Tornabells & Co. had been indebted to them since the month of July, 1898, in the sum of $8,473.54, as was admitted by a letter dated December 8, 1899, and attached to their petition. The prayer of this petition was granted without objection by an order of December 12, 1904 (page 27).

On June 12, 1905, complainants suggested the death of Joaquin Tornabells, the senior member of the firm of Tornabells & Co., and filed their bill of revivor against the heirs, and on the following rule day the heirs answered (pages 27-29). This answer merely adopts for their benefit the answer already filed on behalf of their ancestor. On August 6, 1906, the death of defendant Aran was suggested, an order of revivor made, and time given for the filing of amended answers (page 29). In accordance with this permission amended answers were filed by the representative of Aran,

deceased (pages 29-34), and by those of Tornabells (pages 34-38). In January, 1907, the death of Doitteau, the remaining member of the firm of Tornabells & Co., was suggested and revivor prayed (page 39). On February 2, 1907, the answer of Aran was again allowed to be amended (pages 40-43). On February 11, 1907, Attorney Dexter was appointed guardian *ad litem* for the minor heirs of Doitteau, deceased, and on the following day Attorney Mestre was named in a like capacity for the minor heirs of Tornabells (pages 43, 44).

The cause was tried on its merits at Mayaguez from February 12th to the 15th, 1907, and the court held the same under advisement from that time until June 22d following, on which day the judge rendered a long written opinion (pages 47-66), finding all the issues (as well as some things not in issue) in favor of the defendants and directing a decree to be entered dismissing complainants' bill, which was accordingly done by decree dated June 29, 1907 (page 66). On the same day, and in open court, an appeal to this court was taken and perfected by the complainants (pages 87-89). Thereafter findings of fact and conclusions of law, as well as certain rulings upon the admission or exclusion of evidence offered by complainants, were certified by the court for the purposes of the appeal (pages 67-86), in accordance with the act of Congress of April 7, 1874.

The conclusions of law arrived at by the court are vital to this appeal, in connection with certain evidence offered and excluded, and seem to us wholly at variance with the findings of fact and the well-settled law applicable thereto, and, as they are short, we wish to reproduce them here in advance of the insertion of the assignment of errors. These conclusions were as follows (page 69):

> 1. That the proof on behalf of complainants is not sufficient to entitle them to any relief under their bill of complaint.
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> 2. That there is not now, and never was, any such statute in Porto Rico as the statute of 13th Elizabeth

in England, referring to fraudulent conveyances, because we have the civil-law rule here instead of the common law. Every State in the Union has a reenactment of the Statute of Elizabeth in some form or other among its laws. In the absence of it there is no rule of law preventing a debtor, even when insolvent, for even that does not take from him the power of disposition of his property, from doing about what he pleases with his property and paying his debts with it, or a portion of his debts, and preferring one or more of his creditors with absolute intent to hinder, delay, or even to defeat other creditors. If the favored creditor receives no more than is due him, and permits the debtor to secure no advantage to himself, the transaction will be upheld.

3. That the statute of limitations of one year, as fixed by article 37 of the Mortgage Law, is applicable to suits like the one at bar.

4. That complainants, under the pleadings and proofs herein, are not entitled to subject the properties described in the bill of complaint herein to any lien, interest, or decree by which the complainants would be entitled to have the conveyance and mortgages described in said bill of complaint cancelled and annulled for the benefit of the said complainants.

5. That the bill of complaint should be dismissed.

The errors assigned by the complainants upon this appeal are as follows, modified from page 89 of the record:

First. The court erred in finding as matter of law that in Porto Rico there was no rule of law preventing a debtor, even though insolvent, from preferring one creditor over others with absolute intent to hinder, delay, or even defeat the just claims of said others.

Second. The court erred in finding as matter of law, from the facts found, that the above rule of law was applicable, and in not finding as matter of law that the applicable rule was that a debtor could not transfer his property without any consideration for the purpose of delaying or defeating the just claims of his creditors.

Third. The court erred in finding as matter of law

that the statute of limitations or prescription, as fixed by article 37 of the Mortgage Law of Porto Rico, barred the appellants from relief.

Fourth. The court erred in ruling as inadmissible and excluding from its consideration the testimony of F. L. Cornwell, a witness for complainants, containing the conversation had by said witness with Joaquin Tornabells, one of the original defendants, shortly prior to the time of, and referring to the subject of, the conveyances alleged to be fraudulent by complainants' bill of complaint, which was as follows:

They explained their position, that they were in suspension of payments and they could not meet their obligations, and Mr. Tornabells and Mr. Teillard and Mr. Doitteau unfolded a scheme to me. They said one of them,—I don't remember which one—had been down to Aguadilla and had consulted a lawyer down there, who was not practicing at that time. He was a sugar planter, Amel. He owned the Coloso factory at that time. The scheme that they presented was as follows: That they would make a mortgage in favor of Luis Aran,—I don't remember the exact sum they said for, and against that they would issue a certain number of "vales hipotecarios," notes against the mortgages, and they were to be payable to bearer. According to the scheme they presented to me, they were to be payable to bearer. And in that way they would make the sale of all the properties to Aran, and Tornabells would get these notes. They had some scheme whereby they would protect Aran. I think Doitteau owed Aran some money and they were actually going to take care of him, and the rest of the notes were to go to Tornabells. They came up to consult me about their scheme, and they wanted to know, if they made such a scheme, if I would represent them, if I would act as their counsel and whether it would stand the test of law and attack in the Federal Court. I told them I could not represent them. They were men who had been very kind to me and I had received money from their house in fees. But I told them the only thing to do was to go into bankruptcy, but that I could not represent them in a matter of that kind and I could not

represent them at all. In any business that was straight I would represent them, but that that was crooked. They discussed it there in the office and they asked me some questions. I don't remember the details. After they left, the next I heard of the affair was when it transpired with some different details from what they expressed in the office.

Fifth. **The court erred in ruling as inadmissible and excluding from its consideration that part of the testimony of said witness Cornwell for the complainants which contained the conversation had by said witness with Carlos Doitteau, one of the original defendants, after the making of the conveyances alleged to be fraudulent by complainants' bill, upon the subject of their fraudulent character, which was as follows:**

"I used to talk with Doitteau about it. Doitteau was a man I had considerable affection for, and I told him it was a queer kind of business for him to be in. He said he was the junior partner in the firm and was guided by Don Joaquin (Tornabells). * * *

"He told me the nature of it just as they had there that day. I asked him where the notes were and he told me they were used for collateral purposes, I think to raise money on some of them."

Sixth. **The court erred in ruling as inadmissible and excluding from its consideration that part of the testimony of said witness Cornwell for the complainants which contained the conversation had by said witness with Inocencia Quevedo, widow of said Tornabells, and a party to said suit at the time such conversation was had, which was as follows:**

I then called in Mr. Horton (his then partner) and we explained that we were the attorneys on the other side of the case, but she could tell us anything she wanted to. She started in and said that before Joaquin died he owned lots of properties in the name of Luis Aran, and Mr. Aran had died and the succession of Aran would not turn her back her property, that she was without a cent now; and she began to enumerate all the properties in this bill which Joaquin owned. I asked her how she knew he owned them. She said he ran them all the time, had

majordomos out there and owned them. And she wanted to know if there was some way that she could get something out of it for herself and children. I think it was two children, I don't remember the exact number. She said that they had nothing; she was without anything; that the Arans wouldn't now admit that the property belonged to Joaquin. She wanted to know if there was any way she could get back her property or part of the property and let the rest go to the creditors where it belonged.

Seventh. The court erred in dismissing complainants' bill of complaint instead of granting the prayer of their bill.

For the purpose of sustaining the foregoing assignment of errors we now proceed with the

ARGUMENT.

Point I.

The laws of Porto Rico not only forbade conveyances in fraud of creditors, but held those making the same guilty of a crime.

The assignments numbered one and two may be considered together under this head.

The conclusion of law upon which they are based, which is the conclusion numbered 2, is so remarkable, in view of the plain provisions of various statutes of Porto Rico and of the body of legal decisions thereon in the courts of both Porto Rico and Spain, that some explanation is necessary to enable the court to comprehend how counsel could permit such statutes and decisions to be ignored, and to acquit of blame the lawyers appearing as counsel in the cause—those representing the complainants of negligence in not citing the same to the court, and those representing defendants of actively or passively abetting its ignorance. The explanation

is, as may be inferred from the record of the case, that the point so decided was entirely foreign to the contentions of counsel for defendants. Counsel for complainants regarded the rules applicable to fraudulent conveyances under the Spanish and Porto Rican laws as so nearly identical with those generally prevailing in the American law for the purposes of the present case as to require only passing comment, while the respective counsel for the several defendants, with one exception, coincided with this view, rested their defense upon the denial of all fraud and the statute of limitations, and submitted their case upon that defense. It must, therefore, have been as much a surprise to counsel for defendants as to ourselves when the opinion of the court advanced as one of the principal bases of its conclusion the novel proposition that there was at that time no law preventing fraudulent conveyances in Porto Rico. We will now attempt to show the extent of that error.

As the conveyance in question took place, as alleged, in the year 1900, we must turn our attention to the laws then in force, and not to the Revised Code adopted in the year 1902. The general law at that time fixing civil rights as between parties was what is now known as the "Old Civil Code," which had been put in force by the Spanish government in the year 1889, and was continued in force by the military orders during the period of transition and again by the act of Congress of April 12, 1900, section 8, except as it had been modified by said military orders (Stats. at Large, vol. 31, page 79); and in this "Old Civil Code" (War Department translation, 1899), we find the following article, under the general head of "Contracts," referring to the subject in question:

> ART. 1101. Those who in fulfilling their obligations are guilty of fraud, negligence, or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the losses and damages caused thereby.

ART. 1102. Liability arising from fraud is demandable in all obligations. The renunciation of the action to enforce it is void.

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ART. 1275. Contracts without a consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals.

ART. 1276. The statement of a false consideration in contracts shall render them void, unless it be proven that they were based on another real and illicit one.

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ART. 1280. The following must appear in a public instrument:

1. Acts and contracts the object of which is the creation, transmission, modification, or extinction of property rights in real property.

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6. The assignment of actions or rights arising from an act contained in a public instrument.

All other contracts, in which the amount of the prestations of one of the two contracting parties exceeds 1,500 pesetas, must be reduced to writing, even though it be private.

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ART. 1290. Contracts validly executed may be rescinded in the cases established by law.

ART. 1291. The following may be rescinded:

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3. Those executed in fraud of creditors, when the latter cannot recover, in any other manner, what is due them.

4. Contracts relating to things in litigation should they have been executed by the defendant without the knowledge and approval of the parties in litigation or of the competent judicial authority.

5. Any other contracts specially determined by law.

ART. 1292. Payments made, while in a state of

insolvency, by a debtor on account of obligations which, at the time of making, the debtor could not be compelled to fulfill, may also be rescinded.

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ART. 1295. Rescission obliges the return of the things which were the objects of the contracts, with their fruits and the sum with interest; therefore it can only be carried into effect when the person who may have claimed it can return that which, on his part, he is bound to do.

Neither shall rescission take place when the things which are the object of the contract are legally in the possession of third persons who have not acted in bad faith.

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ART. 1297. Contracts by virtue of which the debtor alienates property, for a good consideration, are presumed to be executed in fraud of creditors.

Alienations for valuable considerations, made by persons against whom a condemnatory judgment, in any instance, has been previously rendered, or a writ of seizure of property has been issued, shall also be presumed fraudulent.

ART. 1298. Any person who may have acquired in bad faith things alienated in fraud of creditors must indemnify the latter for the losses and damages caused to them by the alienation whenever, for any reason whatsoever, it should be impossible for him to return them.

ART. 1299. The action asking rescission must be brought within four years.

It is thus seen that,while there was no one act or law like the Statute of Frauds devoted exclusively to that subject, the various provisions above quoted answered a similar purpose—some of the provisions of the English statute, like the performance within one year, being absent, while other provisions, like the limit in amount to 1,500 pesetas, are unknown to the former; but we still contend that in regard to

conveyances in fraud of creditors the provisions are practically identical in effect with the recognized American law.

In order that the provisions affecting parties other than the fraudulent grantor might also be effective as against such conveyances when recorded, the same principle was incorporated in the mortgage law, which was also in force at the time referred to, as may be seen from the following articles, also copied from the War Department translation of that law:

> ART. 36. Suits for rescission or determination of title shall not be instituted against third persons who have recorded the instruments of their respective interests in conformity with the provisions of this law.
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> ART. 37. Exceptions to the rule contained in the preceding article are:
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> 2. Suits for rescission of conveyances made for the purpose of defrauding creditors in the following cases:
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> When the second conveyance has been made without consideration.
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> When the third person was a party to the fraud.
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> In both cases the third person shall not be prejudiced by any action for rescission not brought within one year from the time of the fraudulent conveyance.
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> ART. 39. By a conveyance without consideration to defraud creditors in case 1, No. 2 of article 37, shall be undertsood not only the one by gift or cession of a right, but also any conveyance, creation or renunciation which the debtor makes of some property right within the periods respectively mentioned in the common or in the proper commercial laws, for the rescission of conveyances made to defraud creditors, provided there was no price or its equivalent, or any preexisting obligation which had fallen due.
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> ART. 40. In accordance with the provisions of the preceding article, and providing the circumstances mentioned exist, the following may be revoked:
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> 3. Conveyances of real property for the payment of debts which have not yet fallen due.

4. Voluntary mortgages created for the security of debts previously contracted without this guaranty, and which have not yet fallen due, provided the conditions of the principal obligation are not thereby encumbered.

5. Any contract by which the debtor transfers or renounces expressly or impliedly any property right.

It shall be understood that no price or its equivalent figures in said contracts, when the notary does not certify as to its delivery, or if the contracting parties acknowledge that the delivery had previously taken place and the fact is not proven or it is shown that it must be embraced in case No. 3 of this article.

ART. 41. The owner of the realty or of the property right shall be considered a party to the fraudulent conveyance in the second case, No. 2 of Art. 37:

1. When it is proven that he knew the purpose of making said conveyance, and that he was a party to it in the character of last owner or in any other capacity.

2. When he acquired his interest, either directly from the debtor or from a subsequent purchaser, for half or less than half its true value.

3. When any kind of false statement or subterfuge has been employed in the contract executed by the debtor, and it is proven that the owner had notice or took advantage thereof.

Here again is the similarity in principle to the American law shown, differing mainly in not leaving the deduction of fraud to the probative force of circumstances in a general way, but attempting to lay down specific rules and limitations therefor.

The foregoing provisions were considered sufficient up to the time of the change of sovereignty, partly because, as shown by the preamble of the military order we are about to quote, such conveyances were further discouraged by the heavy royal imposts placed upon all conveyances, and partly because, previous to American occupation, transfers of property of any considerable value were comparatively infrequent. But after these imposts were abolished by the American

military government debtors soon discovered that the making of fraudulent conveyances was a cheap and, in many cases, practicable scheme for avoiding their debts, as the uncovering of the frauds was made difficult by the strong *prima facie* presumption (by some local courts held conclusive) of good faith and valuable consideration, if that consideration were stated by the notary to be actually passed in money in his presence, though it might be passed back behind the door.

Hence the growing prevalence of this making of fraudulent conveyances was drawn to the attention of the Secretary of Justice during the military governorship of Major General Guy V. Henry, and led to the following recommendation and order of that Secretary, which, upon its approval by said military governor and publication in the Official Gazette, became a law on the 20th day of March, 1899:

To the Major General Commanding the Department.

SIR: The complaint made by the "Crédito y Ahorro Ponceño" (Savings Bank of Ponce) is perfectly justified.

Since the repeal in this island of the tax laid on conveyances of property, many dishonest debtors, perverting the intent of such a beneficent measure, have simulated sales to third parties of such capitals as they possessed, in order to make it impossible for their creditors to collect therefrom the amounts due them.

This is highly injurious to the agricultural and commercial interests of the country, inasmuch as by undermining their very foundation, it absolutely destroys the credit of these two only resources of wealth, whose development and life are thus rendered impossible.

It is, moreover, immoral, and hence the necessity of making more effectual the prohibitions prescribed by our law in the matter. I, therefore, have the honor of submitting for your approval the following:

JUDICIAL ORDER.

1. Stipulations for the conveyance of property entered into after the abolition of the tax on transfers of absolute dominion, not justified under the laws, but effected with the intention of preventing the creditors of either of the parties thereto from making good their claims against such property, shall be considered simulated contracts.

2. Under the preceding article will be comprised all contracts for the transfer of property effected by any person liable at the time for other than mortgage debts, or by any person engaged to guarantee the debts of others, if, upon the execution of said contracts, the notary should not certify in the deed that the price had been delivered in his presence, or unless a deposit in cash has been made in some bank or other institution to the satisfaction of their creditors, covering the full amount of said obligations, or unless sufficient property to meet same has been retained by said debtors.

3. In the cases referred to in the preceding articles, creditors, upon proving the simulation, and for the purpose of collecting their claims or demanding that same be guaranteed, may bring action against their debtor or the party who, as owner, holds the latter's property, said holder being responsible in such cases for the amount due by the direct debtor up to the full value of said property.

4. The attachments that may be decreed by virtue of the action referred to in the preceding article shall be confined, until the expiration of the twelvemonth allowed by the general orders of January nineteenth and thirty-first, 1899, to the anticipatory or preventive inscription thereof in the registry of deeds.

5. Signers of contracts comprised under articles 1 and 2 who fail to cancel same before a notary, within the term of fifteen days from the one next following the publication of this order in the Official Gazette, shall, upon denunciation by their creditors, be prosecuted criminally, and, on conviction, be adjudged guilty of the offense defined in article 562 of the Penal Code.

6. Besides its publication in the Official Gazette and other newspapers of the island, the present order shall be officially communicated to all the presiding judges of courts of justice, who in their turn shall communicate the same to judges of primary courts, municipal judges, notaries and alcaldes within their respective districts, it being the duty of alcaldes to transmit same to the ward-alcaldes (comisarios de barrios) within their municipal limits, for the information of the residents of their respective wards.

San Juan, Porto Rico, March 5, 1899.

(Sgd.) HERMINIO DIAZ NAVARRO,
Secretary of Justice.

Approved:
GUY V. HENRY,
Major General Vols., Commanding.

(This law is only published in the Official Gazette referred to, and in a volume called "Military Orders Having the Force of Law in Porto Rico," volume 2, at page 36, which latter was an official publication of the military government aforesaid.)

The foregoing is clearly a more prohibitive law than is in force in any State within our knowledge. We call the attention of the court, especially in view of the facts found by the court in the present case, to the last two clauses of paragraph 2, which read:

> "or unless a deposit in cash has been made in some bank or other institution to the satisfaction of their creditors, covering the full amount of said obligations, or unless sufficient property to meet same has been retained by said debtors."

It may also be noted that, under the provisions of paragraph 3, the creditor has a choice of remedies and may even recover directly of the fraudulent grantee or holder up to the amount or value of the property held by such person, not being confined to following the property itself.

We shall also later have occasion to call further attention to the provisions of paragraph 5, making the acts so pro-

hibited a crime, in connection with the discussion of the reasons given by the court for excluding the evidence offered by complainants of admissions made by the very parties to the conveyances alleged to be fraudulent.

That the court may not be left in doubt upon the question which may suggest itself, that this order had legally the force ascribed to it as a recognized statute after the adoption by Congress of the law establishing civil government, we take the liberty of quoting short extracts from two opinions of the Supreme Court of Porto Rico, where the above order is recognized and cited and the law, as fixed by it, discussed:

> *Considerando* que si no se puede negar que existe la causa de venta celebrado en 3 de Enero de 1901 entre D. Gorgonio Bolivar Alvarez y su hermana Da. Basilisa de los propios apellidos, puesto que el Notario dá fé de que ésta pagó 63,000 dollars por las cosas vendidas, articulo 1274 del Codigo Civil, no se ha intentado probar como correspondía, despues de la negación, los medios de que se valió Don Herminio Diaz Navarro para reunir aquí esa suma, toda vez que en la carta de autorización nada se le dice ni se habla de la compra ni se ha indicado siquiera la forma ó manera como vino esa importante cantidad á esta ciudad remitida desde España como de la propiedad de la compradora para que fuera realmente el previo de una venta efectiva y entrara positivamente en la propiedad del vendedor, en cuyo caso hubiera podido éste manifestar en el acto del requirimiento que conservaba en su poder cantidad suficiente para cubrir sus obligaciones, ya que también expresó que no depositó en parte alguna el importe de ellas, variando de este modo su situación económica posterior y por consiguente el aspecto jurídico que hoy presenta el contrato realizado.
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> *Considerando* que estos antecedentes unidos á la manera vaga é inverosímil con que explica Doña Basilisa los medios de reunir esa fortuna, cuando sólo usa cédula de undécima clase, y la extrañesa que causa su determinación inexplicable de adquirir hoy tantas fincas y créditos en esta tierra para ella extran-

gera, deciden el ánimo á hacer la afirmación de que solo predominó en este contrato la intención de que los accreedores del vendidor no pudieran hacer efectivos sus créditos en los bienes aparentemente vendidos, y esto viene á producir un contrato simulado segun la *Orden Judicial de 5 de Marzo de 1899.*

Considerando que para mejor comprender el espíritu de dicha orden hay que acudir a preámbulo que la precede y en él categóricamente se expresa que los contratos con el indicado propósito celebrados "son perniciosos para la vida agrícola y comercial del pais, porque, minándolo por su base, destruyen en absoluto el crédito de esas dos únicas fuentes de riqueza á las que de tal modo se les hará imposible desarrollarse y vivir" y se añade además "que es inmoral y se hace por ello necesario hacer más eficaz la prohibición que en ese punto ya contiene nuestra ley;" de donde "resulta que hay que entender y aplicar en un sentido estricto la referida disposición para evitar los males que la misma indica."

Banco Español *vs.* Diaz Navarro, 2 Castro's Dec. de P. R., 88, 98.

(*Translation.*)

It is adjudged that, if the consideration of the sale made on the 3rd of January, 1901, between Don Gorgonio Bolivar Alvarez and his sister Doña Basilisa of the same name, cannot be denied, since the notary certifies that the latter paid 63,000 dollars for the things sold, art. 1274 of the Civil Code, yet it has not been attempted to prove, as was incumbent on her under the issue made, the means of which Don Herminio Diaz Navarro availed himself in order to gather together here such a sum, while in the letter of authorization nothing is said to him nor is the purchase mentioned, nor has there even been suggested the form or manner in which that important amount came to this city by remittance from Spain as the property of the purchaser for the purpose of being actually the price of a cash sale and of entering in fact into the assets of the seller, in which case the latter would have been able to show in the formal act of requisition that he was reserving in his custody an

amount sufficient to cover his obligations, seeing that he also stated that he did not deposit in bank any part of that amount, thus altering his subsequent economic condition and, as a consequence, the legal aspect which the contract executed presents today.

It is further adjudged that the foregoing circumstances, combined with the vague and improbable manner in which Doña Basilisa explains the means of collecting that large sum, when she uses only a cédula of the eleventh class, and the surprise caused by her inexplicable determination to now acquire so many properties and credits in this (to her) foreign land, bring the mind to the firm conclusion that the only dominant motive of this contract was the intention that the creditors of the seller should not collect their debts from the property apparently sold, and this results in producing a simulated contract according to the Judicial Order of March 5th, 1899.

It is further adjudged that, in order better to understand the spirit of said Order, it is necessary to have recourse to the Preamble which precedes it wherein it is catagorically stated that contracts made for the purpose indicated are "injurious to the agricultural and commercial interests of the country, inasmuch as by undermining their very foundation, it absolutely destroys the credit of these two only sources of wealth, whose development and life are thus rendered impossible" and it is said in addition that "it is immoral, and hence the necessity of making more effectual the prohibition prescribed by our law in the matter;" from which it results that it is necessary to construe and apply the foregoing Order in a strict sense in order to avoid the evils which itself indicates.

The language of the Supreme Court of Porto Rico could hardly have been more applicable had it then had under consideration the case now before this court. And it may be a concession to curiosity to note in passing that the lawyer mentioned in the decision, who had acted for the lady adjudged by the court to be guilty of fraud, was the same who,

as Secretary of Justice, had recommended the promulgation of the military order above quoted.

In a previous case the same court had used the following language:

> "En cuanto al art. 1291 del Codigo Civil y la Orden Judicial de 20 de Marzo de 1899 á que se refiere el segundo motivo, que tampoco han podido ser infringidos, toda vez que si bien dichos preceptos legales declaran rescindibles las enagenaciones hechas en fraude de acreedores, sin exceptuar las de los bienes inmuebles que hayan sido inscritas en el Registro de la Propiedad, parten ambos preceptos del supuesto de que dichas enagenaciones hayan sido hechas en fraude de acreedores legítimos, cualidad que no concurre en el demandante," etc.
>
> Moreno *vs.* Suc. de Bahr, 1 Castro's Dec. de P. R., 456.

(*Translation.*)

> With reference to art. 1291 of the Civil Code and the Judicial Order of March 20th, 1899, which are the bases of the second assignment of error, neither of them can have been violated, because, although those legal precepts make rescindable transfers made in fraud of creditors, without excepting therefrom transfers of real estate which may have been recorded in the Registry of Property, both precepts start with the presumption that said transfers have been made in fraud of legitimate creditors—a condition which the plaintiff does not fulfill, etc.

the reason in that case being that plaintiff's note had been previously barred by the statute of limitations.

We next quote from another decision of the same court, in which the judicial order had not been cited or relied on by the parties, yet in which the court holds that the one fact that the debtor by his conveyance had made it impossible for the creditor to collect his debt is sufficient for the maintenance of the action to set aside the conveyance:

"Segun el artículo 1291 del Codigo Civil en su número 3, son rescindibles, entre otros, los contratos celebrados en fraude de acreedores, cuando éstos no puedan de otro modo cobrar lo que se les deba, y que segun el 2° apartado del articulo 1297 del mismo Codigo se presumen fraudulentas las enagenaciones á título oneroso, hechas por aquellas personas contra las cuales se hubiese pronunciado antes sentencia condenatoria en cualquier instancia ó expedido mandamiento de embargo de bienes; * * * y habiendo estimado la Sala sentenciadora que tales acreedores no pueden cobrar lo que se les debe sino mediante la rescisión de dicha escritura por haber quedado Bird insolvente, cuya apreciación es indiscutible en casación por no haber sido impugnado en debida forma, como más adelante se dirá, es indudable que el contrato de préstamo hipotecario contraído por Bird á favor de Bajandas reune todos los requisitos necesarios para calificarlo de fraudulento, sin que hayan sido en su consecuencia infringidos los textos legales anteriormente citados."

Lopez *et al. vs.* Bird *et al.*, 1 Castro's Dec. de P. R., 364.

(*Translation.*)

According to Art. 1291, sub-head 3, of the Civil Code, contracts rescindable are, among others, those entered into in fraud of creditors, when the latter can in no other way collect what may be due to them, and according to the 2nd paragraph of Art. 1297 of the same Code alienations for a valuable consideration are presumed fraudulent when made by those persons against whom a condemnatory judgment in any instance has been previously rendered, or a writ of seizure of property has been issued; * * * and the trial court having found from the proofs that said creditors cannot collect what is due them except by means of the rescission of said conveyance by reason of Bird having been left insolvent, which finding is conclusive on appeal because of not having been properly challenged, as will be hereinafter stated, it cannot be doubted that the contract for a mortgage

> loan entered into by Bird in favor of Bajandas combines all the necessary requisites to be characterized as fraudulent, without the legal principles above cited having been violated by such finding.

This decision is cited because of the construction given to article 1291 of the Civil Code first mentioned. We do not claim the application of article 1297 to our case, because these complainants had no legal proceedings pending against Tornabells & Co. at the time of the conveyance to Aran, which was only natural, as their places of business, with one exception, were in foreign countries, and they could not know of any intention on the part of said firm to dispose of all its property at one stroke until it was accomplished.

See also—

Valdés *vs.* Lopez, 1 Castro's Dec. de P. R., 55.

For the still further assurance of the court that this was no new construction of the law, but was in accordance with well-settled precedents from Spain, we beg its indulgence for stating and quoting from a decision of the Supreme Court of Spain, rendered in 1895, which covers practically all the points of contention regarding the sale or conveyance now in question. A short statement of the facts is necessary to a proper understanding of the court's conclusions:

> During the years 1883-'5 Pedro Garcia had given notes to one Roldan for five items of indebtedness totaling 3,561 pesetas. On October 10, 1884, said Garcia gave a mortgage to Roldan to secure another debt upon certain real property. The mortgage was not recorded. On March 12, 1890, Pedro Garcia sold the mortgaged property to his brother Joaquin by deed which was recorded on July 31st of that year. In the same month of July Roldan began two suits against Pedro, one to execute his mortgage and the other to collect his unsecured debt. Payment not being made, he attached said real property with-

out protest or any notice of lack of ownership in his debtor and the property was sold at auction under said attachment on March 20, 1891. Two days later, March 22, Joaquin Garcia came in with a claim of ownership, asking that all the attachment proceedings be vacated and said property held subject only to the mortgage of October 10, 1884. Roldan made opposition, attacking the conveyance to Joaquin as in fraud of creditors. Joaquin replied by interposing the prescription, or statute of limitation, of one year under Art. 37 of the Mortgage Law. Roldan in turn replied that Joaquin was not a "tercero," as the conveyance was fraudulent, and prayed to have the conveyance to Joaquin rescinded. Both lower courts decided in favor of Roldan and Joaquin appealed, alleging as his second ground that Arts. 39 and 40 of the Mortgage Law applied only to debtors who had judgments against them or had their property attached at the time they conveyed, and as his third ground that the one-year prescription should have been applied. The following are the conclusions of the Supreme Court on that appeal:

"*Considerando* que declarados en la sentencia recurrida, como fundamentos de hecho, indiscutibles en casación cuando no se invoca el mímero 7° del Art. 1692 de la ley de Enjuicimiento civil, que la venta otorgada por D. Pedro Garcia en favor de su hermano D. Joaquin es fraudulenta y hasta simulada, que por ella el acreedor no podía cobrar los créditos no asegurados con hipoteca y que el adquirente fué partícipe del engaño, la casación es improcedente por los motivos segundo y cuarto del recurso, porque siendo rescindible el contrato por tales fundamentos, conforme al núm. 3° del Art. 1291 del Codigo civil aplicado en la sentencia, al declararlo ésta así en su parte dispositiva, ninguna virtualidad puede tener la infracción alegada de los articulos 40 de la ley Hipotecaria y 1297 de dicho Codigo, que sólo establecen presunciones de fraude, mediante las cuales se llega al mismo resultado;

Considerando por lo que toca al motivo tercero, que la prescripción por un año de la acción rescisoria, á contar desde la fecha de la enajenación fraudu-

lenta, ha sido establecida por el Art. 37 de la ley Hipotecaria por modo claro y explícito en favor de los terceros, ó sea, según la definición que de este concepto hace el 27, en favor de los que no han intervenido en el acto ó contrato inscrito; siendo por ello incuestionable que aquel beneficio no alcanza al recurrente, puesto que no es tercero ni puede considerársele como tal en la venta cuya rescisión fué reclamada por su adversario, toda vez que intervino en ella en calidad de comprador, y que, por lo tanto, el Tribunal *a quo* no ha incurrido en el error de derecho que se le atribuye al no admitir la prescripción por el transcurso de un año y al estimar que la acción ejercitada en el pleito no prescribe hasta los quatro, á tenor de lo dispuesto en el art. 1299 del Codigo civil, aplicable en general á todas las acciones rescisorias, con la excepción consignada en el artículo citado de la ley Hipotecaria en favor de los terceros;

Considerando que el art. 34, citado como infringido en el motive quinto y ultimo, no tiene aplicación al presente litigio, porque no obstante la generalidad del principio consignado en este precepto, que es uno de los capitales de dicho cuerpo legal, la materia de la acción rescisoria por enajenación fraudulenta ha sido especialmente regulada por los 37 y siguentes, y que, por lo tanto, no siendo el 34 aplicable al caso, la Sala sentenciadora no ha podido infringirlo, como se sostiene en dicho motivo, bajo el supuesto inadmisible de que el pleito debía resolverse por aquella ley, con exclusión de las prescripciones del Codigo civil."

Juris. Civil de España, vol. 78, p. 261.

(*Translation.*)

As it was declared in the decree appealed from as a finding of fact, which cannot be questioned on appeal when appellants do not base it upon paragraph 7 of article 1692 of the Code of Civil Procedure, that the sale made by Don Pedro Garcia to his brother Don Joaquin is fraudulent and even simulated, that on account of it the creditor could not collect the debt not secured by mortgage, and that the purchaser was a party to the deception, it is adjudged that the ap-

peal is not well founded as to grounds two and four; because, as the contract in consequence of the above findings was rescindable according to paragraph 3 of article 1291 of the Civil Code which was applied by the court below in its decree, there is no foundation, because said decree so declared, for the allegation of infringement of article 40 of the Mortgage Law and 1297 of the Civil Code, which only establish presumptions of fraud by means of which the same result is arrived at.

As to the third ground of appeal, it is adjudged that the limitation for actions of rescission of one year, reckoning from the date of the fraudulent conveyance, has been established by article 37 of the Mortgage Law clearly and expressly in favor of third persons, that is, according to the definition which article 27 gives of this expression, in favor of those who have not taken part in the act or contract inscribed; it being therefore unquestionable that that advantage does not include appellant, since he is not a third person and cannot be considered as such as to the sale, the rescission of which was demanded by his adversary, as he took part in it in the capacity of purchaser; and that, therefore, the court below has not committed the error of law which is attributed to it upon its having disallowed the defence of prescription by the lapse of one year, and upon its holding that the right of action claimed in the suit is not barred until four years, in accordance with the provisions of article 1299 of the Civil Code, which is applicable in general to all actions for rescission, except as specified in said article of the Mortgage Law in favor of third persons.

It is adjudged that article 34 of this law, claimed by the fifth and last ground of appeal to have been violated, has no application to the present controversy; because, notwithstanding the generality of the principle enunciated by its terms, which is one of the essentials of that legal work, the matter of rescissory actions by reason of fraudulent conveyances has been specially regulated by articles 37 *et seq.*; and that, therefore, article 34 not being applicable to the case, the trial court could not have violated it, as that

ground of appeal avers upon the unfounded supposition that the suit should have been determined in accordance with that law to the exclusion of the provisions of the Civil Code.

To a similar effect we might quote from the following decisions of the same court:

Juris. Civil, vol. 79, p. 924, first considerando.

Juris. Civil, vol. 80, p. 138, 1st and 2nd considerandos.

Juris. Civil, vol. 82, p. 552, eighth syllabus.

In view of the various sections of the codes and of the numerous decisions above cited, it seems clear that the conclusion of law numbered 1 was reached only in consequence of the delusion under which the court labored in reaching conclusion numbered 2, else said decisions must have forced the court to an opposite conclusion under the facts found, even if we consider findings of fact numbered 4 and 5 alone (page 67), which showed that a partnership with large and varied assets had by one act rendered itself absolutely insolvent. Our inference is further supported by the line of reasoning employed by the court in reaching the conclusion that complainants' bill should be dismissed before any findings of fact had been made except as indicated in said opinion, as appears on page 63 of the record:

> "Tornabells & Co. had themselves already procured a suspension of payments through the local courts, and it was natural that they should make some effort to realize from their property with a view to paying some portion, or the whole, of their debts. We cannot see why they did not have the right to do this, and to prefer any creditor they saw fit to prefer, and why creditors did not have the right to exercise diligence in securing their debts from them in any way they could. We cannot see why J. Tornabells & Co. could not have done all that is alleged in the way of transferring to Aran, and the latter mortgaging to Duran so as to get secured notes to use. There was

nothing wrong about that unless Tornabells & Co. kept or reserved some benefit to themselves. If it was simply a unique system of banking, there was nothing wrong about it; and if the notes were to be spread broadcast for value, or given to particular creditors, and the property that backed them was effectually lost without privilege of redemption to J. Tornabells & Co., we are wholly unable to see what was illegal about it.

"Let us suppose that Tornabells & Co., instead of selling their property to Aran, had directly themselves issued their own notes secured by all this property, and had sold these notes in the open market just like bonds. What would have been wrong about the transaction? After the sale of the notes, attacking creditors at most could only go after the equity of redemption. They could not set the transaction aside nor embarrass the holders of the notes in any way, and if the property was all eaten up in payment of the notes, that would be the end of it. Now, how is this case materially different from that sort of case? That is why in the light of the evidence of the actual payment by Aran for this property, we are unwilling to disturb the titles of so many people, on a mere suspicion that Tornabells & Co. may have had some secret understanding with Aran and Duran."

This strikes us as rather crude reasoning. The simple and effective answer to it is that, whether the court could see anything morally wrong in it or not, the written law previously quoted, which should have governed the court, had distinctly declared it to be wrong and any person who did it guilty of a crime. In other words, the laws of Porto Rico had said to debtors: "You shall not be allowed to decide for yourselves how you may wish to arrange to pay your creditors at some future time. They have a right to be paid when their claims are due and, if you do not pay them, you must hold your property where they can find it to levy upon or, if you sell it, you must deposit sufficient of the money in some bank to satisfy them or show them you have sufficient other property remaining in your name." The court

specifically finds that Tornabells & Co. did not do these things, yet says there was nothing illegal about the transaction.

How entirely the court ignored the local law upon the subject is further shown by the language and substance of its opinion on page 64 of the record, where several decisions of American courts are cited, those being chosen which most nearly conform to the views above expressed by the court, but which only tend to show that in some States the common-law rule in that regard has been to some extent modified by statute or judicial decision, and therefore to demonstrate, if the local law be kept in mind, that such decisions cannot be applicable to this case.

Even could the law as settled in the States be applicable, the weight of authority is largely against the position taken by the court below.

Carter *vs.* O'Brien, 105 Ala., 305.
Bank *vs.* Northup, 22 N. J. L., 58.
N. Y. Fire Ins. Co. *vs.* Tooker, 35 N. J. Eq., 408.
Corbitt *vs.* Cutcheon, 79 Mich., 41.
Oppenheimer *vs.* Guckenheim, 39 Fla., 617.
Elser *vs.* Graves, 69 Tex., 222.
Seger's Sons *vs.* Thomas Bros., 107 Mo., 635.
Levy *vs.* Williams, 79 Ala., 171.
Aiken *vs.* Steiner, 98 Ala., 355.
Schaferman *vs.* O'Brien, 28 Md., 565.
Beidler *vs.* Crane, 135 Ill., 92.
Martin *vs.* Marshall, 54 Kan., 147.
Chevalier *vs.* Commins, 103 Cal., 580.
Venable *vs.* Bank, 2 Pet., 107.
Jones *vs.* Simpson, 116 U. S., 609.
Shauer *vs.* Alterton, 151 U. S., 607.
Walker *vs.* Collins, 1 C. C. A., 642.
Brittain *vs.* Crowth, 4 C. C. A., 341.

But these cases cannot be applicable, since it has been held distinctly by this court that in the construction and application of statutes of the nature of statutes of frauds, Federal courts should follow the local decisions.

Moses *vs.* Nat. Bank of Lawrence Co., 149 U. S., 298.

Both the findings of fact, as set forth on pages 67 to 69 of the record, and the discussion by the court in its opinion of the "Badges of Fraud" which complainants had claimed existed, as seen on pages 60 to 62, demonstrate how vitally this error of the court affected the result against the rights of the complainants.

Point II.

The statute of limitation of one year protects only innocent third persons, while the statute of four years applies to all implicated in the fraud.

The third assignment of error refers to the ruling of the court that complainants were barred of their remedy by the limitation of one year (conclusion of law No. 3), that limitation being found in article 37 of the mortgage law, hereinbefore quoted (*supra*, p. 13).

This also was a ruling of vital importance, because the bill itself alleged that the fraudulent conveyance by Tornabells & Co. was made and recorded in May, 1900, while the suit was not begun until more than *two years* thereafter, that time being necessarily consumed in foreign creditors, like most of the complainants, learning of the conveyance and obtaining the required judgments and returns of *nulla bona*. Hence, if no suit could be brought even against the principals in the conveyance themselves unless "within one year from the time of the fraudulent conveyance," complainants were clearly barred of their remedy. But that article of the mortgage law is expressly limited by its terms

to "the third person," who "shall not be prejudiced by any action for rescission not brought within one year." The limitation as against parties not "third persons" is fixed by article 1299 of the Civil Code, hereinbefore quoted, at *four* years, as expressly ruled in the last case quoted from the Supreme Court of Spain under the previous head of this brief (*supra*, p. 26).

By the allegations of complainants' bill and subsequent amendments every party defendant thereto was charged with either being parties to or having knowledge of the fraudulent intent of Tornabells & Co., and with having acquired whatever interest he claimed after possessing such knowledge. But as to Tornabells & Co. and Aran, the two *parties* to the conveyance alleged to be fraudulent, they could under no circumstances be entitled to the protection of this limitation, as they could never be "third parties." Hence the conclusion of law in question was erroneous and prejudicial, whatever the state of proofs as to the other defendants, provided our contention above stated as to the application of the one-year limitation is correct.

The wording of the statute seems to be too clear to give room for argument, but as counsel's contention below was insistent and apparently misled the court, and as the precedents upon the question are abundant, we will ask the patience of the court to quote from a few:

(I) *From the Supreme Court of Porto Rico.*

(A) In the year 1894 Lopez began a suit against Valdés in which he was unsuccessful, and judgment for heavy costs was entered against him in September of that year. In November, 1895, Lopez conveyed all his property to one Gastambide and in March, 1896, Valdés brought suit for the rescission of that conveyance, alleging that it had been made so as to prevent his collecting said judgment for costs, as it left Lopez insolvent. This suit resulted in a decree for Valdés declaring the conveyance rescinded and

ordering its record in the Registry of Property canceled. Lopez appealed and the Supreme Court affirmed the decree below, explaining the application of articles 36 and 27 of the Mortgage Law as follows:

"Si bien el artículo 36 de la Ley Hipotecaria preceptúa que las acciones rescisorias no se darán contra tercero, que haya inscrito los títulos de sus respectivos derechos, tratándose como se trata de la rescisión de la venta de la hacienda Santa Bárbara, otorgada por Don Miguel Lopez á favor de su hijo Don Miguel Lopez Gastambide, éste no puede reputarse tercero respecto de dicho contrato por haber intervenido en el mismo, al tenor de lo que preceptúa el artículo 27 de la Ley citata, aparte de que, aún en el supuesto de que se repute tercero á Don Miguel Lopez Gastambide con relación al pleito que con Don Miguel Lopez Gomez sostuvo Don Ramon Valdés, tampoco le favorecería el precepto del artículo 36, por cuanto el 37 exceptúa, de la regla contenida en el anterior, las enajenaciones hechas en fraude de acreedores, cuando el tercero haya sido cómplice en el fraude, como lo fué Don Miguel Lopez Gastambide, según apreciación de la Sala sentenciadora que no ha sido impugnada en casación, no habiéndose infringido por tanto los artículos 36, 37 y 27 de la Ley Hipotecaria según se supone en los motives 10, 11 y 13 del recurso."

Valdés *vs.* Lopez, 1 Castro's Dec. de P. R., 53. S. C., 1 Sentencias del Tribunal Supreme de P. R., 190, 197.

(*Translation.*)

Although article 36 of the Mortgage Law provides that suits for rescission shall not be instituted against third persons who have recorded the instruments of their respective interests, yet as we are treating of the rescission of the sale of the plantation Santa Barbara, made by Don Miguel Lopez to his son Don Miguel Lopez Gastambide, the latter cannot be considered a third person in respect to said contract on account of having been a party to the same, according to the provision of article 27 of said law; besides which, even on the supposition that Don Miguel Lopez

> Gastambide may be considered a third person in relation to the suit which Don Ramon Valdés is having with Don Miguel Lopez Gomez, the rule stated in article 36 could not benefit him inasmuch as article 37 excepts from the rule laid down in the former conveyances made in fraud of creditors, when the third person might have been a party to the fraud, as was Don Miguel Lopez Gastambide according to the finding of the trial court which has not been questioned on the appeal; wherefore articles 36, 37 and 27 of the Mortgage Law have not been violated as is supposed by the 10th, 11th and 13th grounds of the appeal.

Two years later the same court in the case of Lopez *et al. vs.* Bird *et al.*, 1 Castro's Dec. de P. R., 361, and 2 Sent. del T. S. de P. R., 630, repeated the same language, closing the statement of the principle with the following reference to the particular facts:

> (B) "Cuando el tercero haya sido cómplice en el fraude, como lo fué Bajandas por el hecho de haber representado á la Sociedad Guillermo Bird é hijo en el pleito en que se practicó el embargo de las dos casas, las que, no obstante ese embargo, fueron hipotecadas luego su favor."
>
> (*Translation.*)
>
> "When the third person might have been a party to the fraud, as was Bajandas because of the fact of having represented the firm of William Bird & Son in the suit in which the two houses were attached, notwithstanding which said houses were afterwards mortgaged in his favor."

In another case from the same court, after reciting various proven facts, some from written instruments, others from oral testimony, which convinced the court that one litigant had knowledge, or at least notice, that the other litigant had acquired a servitude upon the land which the former had proceeded to buy and place his deed on record, without men-

tion of this existing incumbrance which was not recorded, upon suit brought by the holder of the incumbrance to cancel the record of the deed of the other as against said incumbrance, the court gave the relief asked, and upon appeal the Supreme Court used this language:

> (C) "—hechos todos que convencen y demuestran era sabedor de la carga que sobre el terreno por él comprado pesaba, teniendo por tanto conocimiento al adquirir la finca, ó con anterioridad, de esa carga, por cuya circunstancia no puede tener el carácter de tercero, esté ó no inerita la finca, por ser doctrina constante en varias sentencias del Tribunal Supremo (de España)."
>
> del Valle *vs.* Valdés, 1 Castro's Dec. de P. R., 45.

(*Translation.*)

> —all which facts (referring to the proof of knowledge) conclusively prove and demonstrate that he had knowledge of the lien which burdened the land bought by him; therefore, having knowledge at the time of acquiring the property, or previous thereto, of that lien, he cannot have the character of a third person, whether or not the title to the property was recorded, according to the settled doctrine of the decisions of the Supreme Court of Spain.

(II) *From the Supreme Court of Spain.*

> (A) *Considerando* que la prescripción de la acción rescisoria por termino de un año, contado desde el dia de la enajenación fraudulenta, está de modo claro establecida en el art. 37 de la Ley Hipotecaria exclusivamente á favor de los terceros, reputándose como tales para los efectos de esta disposición los que no han intervenido en el acto ó contrato inscrito, á tenor de lo prevenido en el art. 27, y corroborado por el citado anteriormente, según el cual la existencia de tercero supone siempre una segunda enajenación, como así lo ha establecido también este Tribunal Supremo;
>
> *Considerando,* por lo expuesto, que ejercitada la

acción rescisoria no contra terceros sino contra los herederos y causa-habientes del comprador, carácter que tienen los recurrentes, la Sala sentenciadora, que desestimó la exceptión de prescripción que los mismos alegaron por no serles aplicable el art. 37 de la ley Hipotecaria, no ha cometido la infracción del mismo invocada en el primer motivo del recurso, ni la del art. 41 que, sin referirse á la prescripción se limita á determinar cuando el poseedor es cómplice en el fraude en el caso 2°, num. 2°, del repetido art. 37, habiendo interpretado rectamente dicha Sala el art. 1299 del Codigo civil, aplicable á los acciones rescisorias, con la excepción prevísta en el que acaba de citarse, y á tenor del cual sólo prescriben aquéllas por el termino de cuatro años, no transcurrido en el presente caso."

Juris. Civil, vol. 91, pp. 981, 986.

(*Translation.*)

It is adjudged that the prescription (limitation) of actions for rescission by the term of one year, reckoned from the day of the fraudulent conveyance, is clearly established by article 37 of the Mortgage Law exclusively for the benefit of third persons, those being considered such for the purposes of that provision who have not been parties to the act or contract recorded, as is prescribed by article 27 and corroborated by the article before cited, according to which the existence of a third person (in that sense) always presupposes a second conveyance, as this Supreme Court has also held.

Accordingly, it is further adjudged that, as the present action for rescission is brought, not against third persons, but against the heirs and representatives of the purchaser, in which character the appellants appear, the trial court, which overruled the exception of prescription interposed by these same parties because article 37 of the Mortgage Law was not applicable, has committed no infraction of the same as alleged in the first ground of appeal, nor of article 41 which, without containing any reference to prescription, is limited to determining under what

circumstances the party in possession is an accomplice in the fraud under the second subdivision of paragraph 2 of said article 37; and that said court rightly interpreted article 1299 of the Civil Code, which is applicable to rescissory actions, with the exception fixed by the article which has just been cited, and according to which those actions are only barred by the lapse of *four years*—which have not elapsed in the present case.

(B) *"Considerando,* que es inaplicable al presente caso, y tampoco ha podido ser infringido el art. 39 de la ley Hipotecaria ni la doctrina al mismo relativa, citados en el primer motive, porque no se trata de sugundas enajenaciones, á las cuales se refiere únicamente dicho artículo, en relación con el caso 1°, num. 2°, del art. 37 de la misma ley, y porque, abstracción hecha de lo que acaba de exponerse, tampoco tendría aplicación al presente caso, según el num. 3° del ultimo artículo, por ser cómplices los hijos del deudor."

Juris. Civil, vol. 98, p. 367.

(*Translation.*)

It is adjudged that neither article 39 of the Mortgage Law, nor the doctrine relative to the same, cited in the first ground of appeal, is applicable to the present case, and hence cannot have been violated, because there are involved no second transfers, to which alone said article refers in connection with subdivision 1 of paragraph 2 of article 37 of the same law, and because, aside from what has just been stated, it could not apply to the present case, according to paragraph 3 of the last article, on account of the sons of the debtor being accomplices.

Also see

Juris. Civil, vol. 97, p. 525.

It may be claimed that article 36 of the Mortgage Law forbids the bringing of actions for rescission against "terceros," but the contrary was distinctly held in the case of

Valdes *vs.* Lopez (*supra,* page 32), in the Supreme Court of Porto Rico, and has been similarly held by the Supreme Court of Spain, where conveyances in fraud of creditors were involved.

Juris. Civil, vol. 57, page 40.
Juris. Civil, vol. 59, page 837.

We therefore submit that the one-year limitation could never be held to apply for the benefit of Tornabells, Doitteau or Aran, or their heirs, nor for the benefit of any subsequent party who was an "accomplice in the fraud," or who had knowledge of the same when he acquired his interest—hence the court committed error gravely prejudicial in holding broadly that said limitation was fatal to complainants' right of action, instead of giving them the benefit of the four years fixed by article 1299 of the Civil Code, within which period this suit was begun.

But, if necessary, we might go farther and contend that, even if the statute of one year were strictly applicable in a court of law, a court of equity would not be absolutely bound by such statutes, as that court merely applies them by analogy when they seem fair and just, but sometime shortening, at other times extending, the time, as justice may require.

Allore *vs.* Jewell, 94 U. S., 506.
Sullivan *vs.* R. R. Co., 94 U. S., 806.
Kibby *vs.* L. S., etc., Co., 120 U. S., 130.
Ide *vs.* Trorlight Co., 115 Fed. Rep., 137.
Potts *vs.* Alexander, 118 Fed. Rep., 885.

We submit that a statute of limitation of one year in a small island like Porto Rico, where much of its commercial intercourse was necessarily with foreign countries, should not be applied by a court of equity against foreign creditors, as the record shows these were, especially where the defendant firm was in suspension of payments and a war, followed by a change of sovereignty, had recently occurred.

Point III.

The testimony offered as to the admissions, made by defendant Tornabells before the conveyance was executed, was admissible.

This covers the fourth assignment of error. Complainants produced as a witness in their behalf F. L. Cornwell, who was also one of their solicitors. Mr. Cornwell first testified generally that he was an attorney at law; that Tornabells & Company had been clients of his from the time he settled in Porto Rico, up to shortly before they made the transfer to Aran; and that subsequently to that he represented them on some occasions (p. 70).

Upon the asking of the succeeding question one of the counsel for some of the defendants (Mr. Dexter) objected to Mr. Cornwell testifying to any conversation with Tornabells touching the conveyance in controversy because of the relation of attorney and client alleged to be existing between them and because he was in a sense a complainant by reason of being employed upon a contingent fee. Mr. Dexter was permitted by the court to examine the witness in order to bring out these points (pp. 71-73). Mr. Boerman, counsel for another defendant, objected to the proposed testimony upon the further ground that the witness as an interested party could not disclose conversations with a person since deceased (p. 74). At this point the court took these objections under advisement during the noon recess. Upon reconvening the court made the following statement (p. 79):

> "The Court: What I want to settle in my mind is whether a client, who had been employing a certain firm for years and then ascertaining that they had obtained a case against him and then consulted them knowing that they had the case against him, whether or not, if the attorney chose to come and testify as to what the client and deceased, as it happens here, con-

fided to him, he will be permitted to testify as what may be in favor of his present client."

Whereupon, after a few words more from counsel, the court answered:

"I am going to permit Mr. Cornwell to testify, reserving the right to see what it is, giving all the counsel a right to except."

Mr. Dexter then interposed, by permission of the court, with some record proof of the cases in which Mr. Cornwell had represented Tornabells & Company, after which Mr. Cornwell proceeded with his testimony (page 81). We quote the report of his testimony upon this point verbatim:

There was present Mr. Joaquin Tornabells, his partner Mr. Carlos Doitteau and Arturo Teillard, the French Vice-Consul.

The COURT: How long before the actual transfer was that?

I don't know the exact dates. I should say it was probably thirty days before the transfer, but that is more or less. I don't remember the exact date. They came to my office and Mr. Tornabells I think was the spokesman of the party, although Mr. Teillard was the right-hand man of that firm, although he was not a member of it. They explained to me the fact that they went into suspension of payments and they could not pay their debts.

Q. Do you know why the French Vice-Consul came along with them?

Doitteau was a Frenchman and he and Teillard were great friends. In fact, in all the business I ever did for them, this man Teillard intervened. They explained their position, that they were in suspension of payments and they could not meet their obligations, and Mr. Tornabells and Mr. Teillard and Mr. Doitteau unfolded a scheme to me. They said one of them,—I don't remember which one—had been down to Aguadilla and had consulted a lawyer down there, who was not practicing at that time. He was a sugar planter, Amel. He owned the Coloso

factory at that time. The scheme that they presented was as follows: That they would make a mortgage in favor of Louis Aran,—I don't remember the exact sum they said for, and against that they would issue a certain number of 'vales hipotecarios,' notes against the mortgages, and they were to be payable to bearer. According to the scheme they presented to me, they were to be payable to bearer. And in that way they would make the sale of all the properties to Aran, and Tornabells would get these notes. They had some scheme whereby they would protect Aran. I think Doitteau owed Aran some money and they were actually going to take care of him, and the rest of the notes were to go to Tornabells. They came up to consult me about their scheme, and they wanted to know, if they made such a scheme, if I would represent them, if I would act as their counsel and whether it would stand the test of law and attack in the Federal Court. I told them I could not represent them. They were men who had been very kind to me and I had received money from their house in fees. But I told them the only thing to do was to go into bankruptcy, but that I could not represent them in a matter of that kind and I could not represent them at all. In any business that was straight I would represent them, but that that was crooked. They discussed it there in the office and they asked me some questions. I don't remember the details. After they left, the next I heard of the affair was when it transpired with some different details from what they expressed in the office.

The COURT: How long a time transpired before you heard of it again?

I couldn't tell you, but it was within two months.

As a supplement to the foregoing should also be quoted the further statements of the witness, in answer to questions by the court (page 83):

Q. When they came into the office, who did they say they wanted to defraud, or did Tornabells want to keep all his property or to make some creditors preferred?

A. That was the idea. There were one or two of his friends he wanted to protect, but the general idea was to save all his property; although I will say this for Tornabells: he said there in the office that his intention was finally not to defraud any of his creditors, but he hoped finally to pay everybody back.

Q. He simply wanted to possess his property so as to get out of it sufficient to pay his debts?

A. That was possibly what he wanted to do with it.

Although this, and other testimony referred to in following assignments of error, was at the time allowed to be given, the court reserved its final decision as to its admissibility, and upon its final consideration of the case ruled that it should be excluded, as stated at the close of the judge's certificate as to rulings on evidence (page 86), and in his written opinion (page 59) the ruling as stated in the certificate is as follows:

"As appears from the above, the court tentatively allowed the foregoing evidence of said witness Cornwell to be admitted, but subsequently upon the consideration of the testimony as a whole and upon making its findings of fact and law and rendering its decision herein the court did determine and rule that defendants' objections to the testimony of said witness Cornwell in so far as the same related to conversations between said witness and Joaquin Tornabells, Carlos Doitteau or Luis Aran should be sustained and said testimony excluded, because the plan outlined by said Tornabells during said conversation did not constitute a fraud upon creditors under the laws of Porto Rico at that time in force, hence the privilege existing as to confidential communications between attorney and client was applicable thereto, and further because such testimony involved admissions of a dead man against the interests of his own heirs who are parties to the suit."

* * * * * * *

"To which decisions and ruling of the court, re-

jecting and excluding the testimony aforesaid, the complainants by their counsel did then and there except."

The question involved, therefore, is whether the privilege protecting confidential communications between attorney and client is unlimited; and, if not, whether the communication made by Tornabells to Cornwell was of such a character as to forfeit his right of privilege. We claim that not all such communications are privileged and that the statement in question was such as to forfeit the privilege.

It seems hardly necessary, in view of the decisions already cited under Point I, to discuss the question whether the scheme outlined in the above testimony of Cornwell involved an unlawful and fraudulent intention. We claim, as we have before stated, that it was under the laws of Porto Rico not only fraudulent but criminal; and, if so, the reason given by the court below for excluding the testimony falls. Yet as very similar circumstances have been considered and described by this court in a case before it, we take the liberty of quoting a comprehensive paragraph:

> "We have considered this case, so far, upon the assumption of the circuit justice, that the agreement was executed and delivered by Ferguson to Dent in good faith as to Ferguson's creditors. We do not concur in this assumption. If the voluminous record before us discloses a single fact tending to sustain that assumption, except a general expression of opinion by some of the witnesses that he was an honest man, it has escaped our search. The instrument itself was executed under circumstances which would lead a court to presume fraud upon creditors. It was a conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing incumbrances, amounted to the value of his property. We, therefore, agree with the district judge on this point, that the real contract was one between Ferguson and Dent to defraud the creditors out of the property conveyed, and to so conceal and

cloud the title that they could be circumvented, hindered, and delayed, and coerced into settlements and compromises. We think the evidence shows beyond doubt that Ferguson willingly participated for ten years in carrying out this plot." * * *

"We do not think that complainant's counsel gives an explanation of the testimony of McWilliams which strengthens their claim to relief. That claim, stated in his own language is: 'That Ferguson placed his property in Dent's hands, to be used in liquidating his debts; and when this was done, the property, or so much of it as had not been consumed in the payment of lebts, was to be restored to Ferguson; and that in the meantime Ferguson was to have enough of the rents to live on.' * * *

"Such an arrangement, so entirely inconsistent with the absolute conveyance of the property as executed between the parties, has all the features of a fraud upon creditors. It reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors have a right of immediate appropriation to their debts, and involves a secret trust for the return to himself of property of which such creditors have the immediate right of sale. The law does not countenance any such transaction, but leaves both parties in the position where they have placed themselves. Lukins *vs.* Aird, 73 U. S., 6 Wall., 78."

Dent *vs.* Ferguson, 132 U. S., 50, 62, 67.

It is worthy of note that no State statute is cited or referred to either by the court or by counsel as influencing the equitable principles controlling the above decision.

Another case from this court in which the decision is based upon the Alabama statute, said to be "copied from the English statute of 13th Elizabeth," which we have under Point I shown to be so similar to the Porto Rican law, states the law thus positively:

"If an individual, being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply

if such a conveyance be male by a person free from all embarrassments and without reference to future responsibility.

* * * * * * *

"But to avoid the settlement insolvency need not be shown or presumed. It is enough to know that, when the settlement was made, Goffe was engaged in merchandises principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly overestimated. On such a basis, no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made the settlement. A conveyance under such circumstances, we think, would be void against creditors at common law."

Parish *vs.* Murphree, 13 How., 92, 98, 100.

Other courts have followed the above precedents and plainly stated the principle, citing much additional authority. See—

Thompson *vs.* Crane, 73 Fed. Rep., 327.

Plow Company *vs.* Sherman, 32 L. R. A., 33, and notes.

The above-cited American cases merely serve to show the identity of principle underlying these decisions and those of the Porto Rican and Spanish courts cited under Point I—which renders easy an affirmative answer to the question of the admissibility of Cornwell's testimony as against the objection of privileged communication—unless that privilege can cover communications involving the commission of a proposed fraud.

It is therefore necessary to determine the exact limits of a client's privilege in that regard.

The general rule was early stated in this court by Justice Story and has never been doubted:

> "The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege indeed, is not that of the attorney but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of the relation, such counsel are not at liberty even if they wish, to disclose; and the law holds their testimony incompetent."
>
> Chirac *vs.* Reinecker, 11 Wheat., 280, 294.

No case arose, so far as we have discovered, in which this court was called upon to determine the exceptions to this general statement until many years later in a criminal case. There the trial court had admitted a communication from client to counsel which the Government claimed involved a scheme to commit the crime, while the defendant claimed it was protected by his privilege. This court reversed the conviction because it found the communication not even to indicate any wrongdoing, but in discussing the limitations of the privilege of such communications it quoted with approval the English case of Queen *vs.* Cox and the statement by Mr. Justice Stephen therein that—

> "the question was, 'whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purposes for which his advice is wanted, the communication between the two is privileged? We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose.' After citing and commenting upon a large number of cases, he comes to the conclusion that, if the com-

> munication be made in furtherance of any criminal or fraudulent purpose, it is not privileged."
> Alexander *vs.* United States, 138 U. S., 353. 358.

The Cox case was later (1895) approved in England in Williams *vs.* Quebrada, etc., Ry. Co. (2 Ch., 751).

In other American jurisdictions the decisions have not been uniform, the earlier cases tending to restrict the exception to the privilege to where the communication involved an intent to commit a crime or some act *malum in se*, and Chancellor Walworth felt constrained to follow them against his better judgment, as he stated in

Bank of Utica *vs.* Mersereau, 3 Barb. Ch., 528, 598.

It remained, however, for Vice-Chancellor Greene, of the New Jersey Chancery Court, to make such an exhaustive and conclusive review of the body of the law upon the subject that his conclusions have not been, and in our judgment cannot be, successfully controverted. He reviews all the prior decisions, especially those upon which Chancellor Walworth depended, shows that the English cases have been overruled by the Cox case, cited by this court in the Alexander case, *supra*, and that all the American cases were a more or less blind following of these English cases, now overruled, and finally states the law as he finds it to be as follows:

> "As I understand the case, the rule in its different phases and the reasons may be thus stated: If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it there is no privilege, for it is no part of an attorney's duty to assist in crime—he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy,

which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offense.

"If the client discloses his fraudulent purpose and the attorney does not join in the scheme, but repudiates all connection with it, there cannot be, properly speaking, professional employment to effect such purpose, and consequently there is no privilege; if the client does not frankly and freely disclose his object and intention, as well as the facts, there is no professional confidence, and consequently no privilege. * * *

"The question has never been decided in any reported case in this State, and, in my judgment, the rule as laid down by the court of queen's bench should be adopted, not only on account of the great weight of such an authority, but because it puts the question of privileged communications on high ground of honesty and integrity, worthy of the dignity and honor of the profession of the law.

"The principal case was on indictment, but the rule is as imperative in civil causes—the only difference being in the method of its application."

Matthews *vs.* Hoagland, 48 N. J. Eq., 455, 469.

If the case from Massachusetts, in 12 Pickering, cited by Chancellor Walworth, supports the result stated by him, it has been at least doubted in that jurisdiction in a more recent case, wherein the court says:

"If the case disclosed anything having a tendency to show that the witness (a lawyer) was acting for himself as a party to the transaction, or that he was consulted in aid of any intended fraud, or that his advice was asked for any dishonest purpose, the matter would have raised a more serious question."

Higbee *vs.* Dresser, 103 Mass., 523, 526.

In Missouri the Hoagland case, above quoted from, has been cited and followed after a full review of all the precedents, the Kansas City Court of Appeals stating the ques-

tion in the form "How will this apply to things so low down in the scale of wrong as cheating creditors?" and answering it as follows:

> "That there ought not to be any distinction or difference, in principle, between crime and fraud, in the respect of applying a privilege of concealment to either, I have no doubt. Both are the doing, or contriving to do, things *mala in se*. Both are against conscience. That they were regarded as being without distinction in Queen *vs.* Cox & Railston (a case of fraud) is seen from the interruption of counsel during the argument.
>
> * * * * * * *
>
> "Our Statute of 1889, sec. 3568, makes every one a party to the conveyance of goods and chattels for the purpose of defrauding creditors guilty of a misdemeanor, but I attach no importance to this in determining the question. To cheat or defraud is bad in itself, and does not require the condemnation of statute law to become iniquitous."
>
> Hamil and Co. *vs.* England, 50 Mo. App., 338, 346.

In other jurisdictions the rule has been declared as laid down above by the New Jersey court:

> "The rule, however, is well settled that communications made to counsel in contemplation of fraud or a criminal act are not privileged."
>
> Hartness *vs.* Brown, 21 Wash., 655, 668.

> "The act of preference (of one creditor over another by a failing debtor) is prohibited and rendered illegal, and whatever be the method adopted to attain the illegal object, courts should treat it as coming under the ban of the statute. This being true, is the communication between attorney and client, looking to the accomplishment of such an illegal object, entitled to protection as privileged and confidential? Is it any part of the duty of an attorney to counsel as to the best methods of violating the law; and must he keep secret and inviolate

information imparted to him of the intention and purpose of his client to do so? Such a doctrine would be contrary to public policy, subversive of the principles of justice, contrary to good morals, and bring our honorable profession into merited contempt with all just-minded men. 'Where a solicitor is a party to a fraud, no privilege attaches to the communication to him on the subject, because the contriving of a fraud is no part of his duty as solicitor.' 1 Whart. Ev., sec. 590; Poole *vs.* Railway Co., 58 Tex., 134; Cutts *vs.* Pickering, 3 Ch. R., 66; Russell *vs.* Jackson, 9 Hare, 389."

Taylor *vs.* Evans (Court of Civil App. of Texas, 1894), 29 S. W. Rep., 172.

The above case does not seem to be officially reported in the Court of Civil Appeals reports.

In the United States Circuit Court of Appeals for the Second Circuit the determination of the actual question before the court was based upon the terms of a statute of New York (where the case originated), but at the close of the opinion the court takes occasion to say:

"Before the statute, the privilege did not apply to all communications between client and attorney, but only to such as passed between them in professional confidence; and the courts generally repudiated the proposition that the contriving of a fraud or the conniving in a crime could form part of the professional occupation of an attorney or counsel."

Butler *vs.* Fayerweather, 33 C. C. A., 625.

This last case also holds, with citation of authorities, that "the laws of the State (or Territory) in which the court is held are the rules of decision for the courts of the United States as to the competency of witnesses," and that probably "this provision supplies the criterion of the competency of evidence as well as the competency of witnesses."

See also—

Insurance Co. *vs.* Union Trust Co., 112 U. S., 250.

Building & L. Ass'n *vs.* Robinson, 7 C. C. A., 444.

It is pertinent, therefore, to inquire as to the local statutes upon the question under discussion. The legislature of Porto Rico passed a law of evidence in 1905 (no settled rules existed under the Spanish régime) and the sections here applicable are the following:

> SECTION 35. In conformity with the preceding provisions, evidence of the following facts may be given upon a trial:
>
> * * * * * * *
>
> 2. The act, declaration, or admission of a party as evidence against such party.
>
> * * * * * * *
>
> 4 The act or declaration, verbal or written, of a person deceased or out of the jurisdiction of the court, in respect to the pedigree, birth, parentage, age, marriage, death, or relationship, of any person related by blood or marriage, to such person; *the act or declaration of a deceased person done or made against his interest in respect to his property.* (Italics ours.)
>
> SECTION 38. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded, etc.
>
> (Section 39 excludes persons of unsound mind and children under 10 years of age who appear incapable.)
>
> SECTION 40. A person cannot be examined as a witness in the following cases:
>
> 1. (Treats of husband and wife.)
>
> 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity; but this paragraph shall not

be applied to an action between the lawyer and his client, where the existence, amount, validity and circumstances of an agreement about the payment of fees are at issue; but no communication is privileged under this subdivision when the same was made with the intention that it should be communicated to any person having an interest adverse to the client, or *when the same was made in furtherance of a crime or fraud then being perpetrated or in contemplation.* (Italics ours.)

3. (Treats of priest and parishioner.)
4. (Treats of physician and patient.)
5. (Treats of public officers and official business.)

From which it will be seen that the statute of Porto Rico is in touch with the advanced thought of the recent decisions on the subject.

Believing we have demonstrated that the testimony of Cornwell should not have been excluded on the ground of privileged communication, we will say a word upon the other objection, perhaps sufficiently interposed, that it was inadmissible because the other party had died meantime. Counsel who made this latter objection evidently had in mind the provisions of section 858 of the United States Revised Statutes as found in the printed volume, but that section had before this trial took place been amended by the act of Congress of June 29, 1906 (Stats. at Large, vol. 34, page 618), which changed it so as to read as follows:

> "SECTION 858. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

Turning again, therefore, to the local law of evidence, above cited and quoted from, we find that such testimony is so clearly admissible under the provisions of sections 35 and 38 of that law as to require no further discussion.

From all the foregoing we submit, without further elabo-

ration, that the testimony of Cornwell, quoted at the beginning of the discussion of this point, was not only admissible and pertinent, but even in itself alone—as counsel admitted that whatever Mr. Cornwell should testify would be true (page 73)—sufficient to support a decree for complainants, at least as against all parties making the admissions.

That such would have been the effect of that evidence in the local courts of Porto Rico may be seen from the following decision of its Supreme Court:

> The facts found by the trial court were, that on Aug. 16, 1901, one Juan Maldonado made a deed of a tract of land to his son-in-law, Saturnino Sastre, reciting a consideration of $1,800 received *before* the execution of the deed; that before said conveyance Maldonado was indebted to the plaintiff, Alonso del Rio, on a promissory note for the sum of $674 to become due on Dec. 31, 1901; that in July, 1903, the creditor, del Rio, filed his suit alleging that said conveyance was simulated for the purpose of defrauding said creditor, as his debtor had no property left to satisfy the debt, which the court found to be true. The trial court adjudged said conveyance simulated and fraudulent because Maldonado had retained no property in his own name and had nowhere deposited sufficient money from the alleged proceeds of the sale to pay said debt, as required by the Military Order of March 20, 1899 (quoted under Point I).
>
> The Supreme Court of Porto Rico, upon the appeal of Maldonado from that decree, supplemented the findings of fact below by stating as proven that the existence of the debt of del Rio was not denied by any evidence, and that defendants had introduced no proof to show where Sastre got the $1,800 which he claimed to have paid Maldonado as the purchase price. After referring to these facts the Supreme Court recited and discussed the testimony concerning the admissions of Sastre in the following words:
>
> "Muy importantes son las declaraciones prestadas en el juicio oral por los testigos (tal y tal), de los cuales el primero dice que un dia estuvo Sastre en su

casa y le dijo que iba para Arecibo á recibir una escritura que habia de pasarle su suegro Maldonado para evitar que le perjudicara Don Alonso del Rio, pero que la finca que iba á recibir la reconoceria siempre como de Maldonado; el segundo que Sastre le manifestó que estaba asegurado como hijo politico de Maldonado por lo que pudiera ocurrirle luego; el tercero que Sastre fué con una máquina á su casa y le expresó que su suegro le iba á pasar su finca para evitar que le estafara Don Alonso del Rio, pero que siempre reconoceria esa finca como de su suegro; y el cuarto que Sastre le reurió que iba á recibir de Maldonado la escritura de la finca y que siempre reconoceria ésta como de Maldonado á pesar de estar á su nombre.

"Ante el resultado de las pruebas practicadas no vacilamos en calificar de simulado el contrato de compraventa celebrado por Don Juan Maldonado Rivera y su yerno Don Saturnino Sastre Suárez, pues las manifestaciones extrajudicialmente hechas por Sastre asi lo convencen y lo corrobora la falta de pruebas de que Sastre tuviera recursos para comprar la finca vendida."

Del Rio *vs.* Sastre, 2 Castro, Dec. de P. R., 551, 557.

(*Translation.*)

Especially important are the statements made at the oral trial by the witnesses (naming them), of whom the first says that one day Sastre was at his house and told him that he was on his way to Arecibo to receive a deed which his father-in-law, Maldonado, had to deliver to him in order that he might prevent Don Alonso del Rio from injuring him, but that the property which he was going to receive he should always consider as belonging to Maldonado; the second testified that Sastre stated to him that he was being made safe, as the son-in-law of Maldonado, against what might happen to him later on; the third, that Sastre went with some machine to his house and stated to him that his father-in-law was going to transfer his farm to him in order to avoid

being robbed of it by Don Alonso del Rio, but that he should always recognize the farm as belonging to his father-in-law; and the fourth, that Sastre informed him that he was going to receive from Maldonado a deed to the farm and that he should always regard the same as belonging to Maldonado, in spite of its being in his own name.

In view of the effect of the evidence produced, we do not hesitate in adjudging to be simulated the contract of purchase and sale entered into between Don Juan Maldonado Rivera and his son-in-law Don Saturnino Sastre Suárez, since the statements made extrajudicially by Sastre convince us of it, and it is corroborated by the lack of any proof that Sastre could have had resources to buy the property sold.

Point IV.

The testimony offered as to the admissions made by defendant Doitteau, after the conveyance was made, was admissible.

This refers to and covers the fifth assignment of error. Reference is made by that assignment to other testimony of the same witness Cornwell as to conversations with Carlos Doitteau, one of the original defendants and the second member of the firm of J. Tornabells & Co., who had also died before the trial was had. This testimony appears on page 83 of the record and was as follows:

> "I used to talk with Doitteau about it. Doitteau was a man I had considerable affection for, and I told him it was a queer kind of business for him to be in. He said he was the junior partner in the firm and was guided by Don Joaquin (Tornabells).
> * * *
> "He told me the nature of it just as they had there that day. I asked him where the notes were and he told me they were used for collateral purposes, I think to raise money on some of them."

The ruling of the court excluding this testimony was upon the same grounds as that relating to the conversation with Tornabells and is included in the extract from the judge's certificate quoted under the previous point (*supra*, page 41). The argument touching the previous point will, therefore, also apply to this one—with the difference that the conversation with Doitteau took place *after* the bill in the present equity suit was filed in which Mr. Cornwell was one of the counsel of record, hence with the knowledge on the part of Doitteau that he was talking to one of the attorneys of the opposite party therein.

Therefore the question of confidential communication could not be applicable, and the only objection to be considered must be whether the death of Doitteau should exclude it—the last question argued under the previous point.

Point V.

The testimony offered as to the admissions made by Inocencia Quevedo, widow of Tornabells, after she was a party defendant, was admissible.

This refers to and covers the sixth assignment of error. The court will note that, after the death of Tornabells, his widow and administratrix, Inocencia Quevedo, was made a party defendant and filed a full answer (pages 34-39).

The proceedings touching the admissibility of extra-judicial statements in the nature of admissions, made by her a few days before the trial, begin on page 74 of the record. Mr. Cornwell stated preliminarily that this lady came to his office (which was in the city of Mayaguez where all the parties lived) and wanted to talk about the case. At that point the objection was made that such evidence was inadmissible because it was hearsay, and for the further reason that the lady herself was within call. Counsel for appellants then called the attention of the court to the distinction

between a party to the cause and a mere witness. Counsel for appellees then entered the additional objection that its admission would be a violation of section 858, United States Revised Statutes. Counsel for appellants then stated that it was not claimed that these statements of this defendant would bind any other than herself and the minor children whom she represented. Finally the judge concluded to receive it in the same way he had the testimony about other conversations, reserving his ultimate decision until the final disposition of the case, which is recited in the certificate of the court (page 86) as follows:

> "And the court did further determine and rule that defendants' objection to the testimony of said witness Cornwell in so far as the same related to conversations between said witness and Inocencia Quevedo, the widow of Tornabells, should be sustained and said testimony excluded because it was the statement of a third party intended to impugn after the fact the *bona fides* of a transfer, the parties to which were dead at the time such testimony was offered and was at best hearsay, as said widow of Tornabells was still alive within the jurisdiction of the court and subject to be called as a witness if her testimony regarding such transaction would be admissible.
>
> "To which decisions and ruling of the court, rejecting and excluding the testimony aforesaid, the complainants by their counsel did then and there except."

The substantive part of this testimony of Cornwell regarding the admissions of this defendant is contained on page 76 of the record and is as follows:

> "Mrs. Tornabells came up in the office. She was accompanied by a sister of hers. She said she came to me to find out if there was any way we could help her out of her trouble.
>
> "I was rather surprised to see her there and I asked her if she knew we were the attorneys on the other side and she said she did, but that she was in a very difficult position and she wanted to know if we could not help her. I then called in Mr. Horton (his

then partner) and we explained that we were the attorneys on the other side of the case, but she could tell us anything she wanted to. She started in and said that before Joaquin died he owned lots of properties in the name of Luis Aran, and Mr. Aran had died and the succession of Aran would not turn her back her property; that she was without a cent now; and she began to enumerate all the properties in this bill which Joaquin owned. I asked her how she knew he owned them. She said he ran them all the time, had majordomos out there and owned them. And she wanted to know if there was some way that she could get something out of it for herself and children. I think it was two children, I don't remember the exact number. She said that they had nothing; she was without anything; that the Arans wouldn't now admit that the property belonged to Joaquin. She wanted to know if there was any way she could get back her property or part of the property and let the rest go to the creditors where it belonged. I told her we could not do anything at that time; that Judge Pettingill was the leading counsel in the case; that I would take the matter up with Judge Pettingill as soon as he returned—he had gone to the States. Then I think she came into the office every other day, crying and saying that this person knew and that person knew about what a great injustice had been done her. She said she didn't have any money left; that she was in a pitiable condition. She wanted to know if we couldn't get her the house she lived in on the Playa and I think the house where the sawmill was."

We have never understood the theory upon which the judge below excluded this evidence. It is so clearly admissible under sections 35 (2) and 38 of the Law of Evidence of Porto Rico hereinbefore quoted (page 50), that we shall content ourselves with citing authorities in support of the same, without further discussion.

United States *vs.* Wood, 14 Pet., 430.

Sonnenthiel *vs.* Moerlein Brewing Co., 172 U. S., 401, 415.

Tyler *vs.* Tyler, 126 Ill., 525.

Point VI.

The findings of fact are inconsistent with conclusions of law, and consistent only with granting relief.

The first and fifth conclusions of law were to the effect that, as complainants had failed to make out a *prima facie* case, their bill should be dismissed.

In the opinion of the judge, explaining why he reached that conclusion, he uses the following language:

> "If the contention that is insisted on by counsel for complainants with reference to the status of the pleadings is to prevail, then this (referring to the allegations of the bill and certain documentary evidence) is practically all the evidence there is in the case, and the court is forced to do its guessing from the largely unproved and unsworn to allegations of the bill, and the scraps of competent testimony introduced at the hearing. It is contended that because the bill is not sworn to and respondents did what would be called at law demurring to the evidence, that is, rested at the end of complainants' case, and refused to proceed further, that then even though Tornabells, Doitteau, and Aran have their own sworn answers in, and their widows later filed specific answers, the same cannot be considered for any purpose because not supported by oral proof, and that this condition of things simply obliges complainants to prove the several statements of their bill by one witness only in each instance. Complainants contend that they have done this, particularly if the evidence of one of their counsel, Mr. Cornwell, is admissable, and that in any event even without Mr. Cornwell's evidence, the exhibits and the other scraps of testimony make such a case of circumstantial evidence of fraud and throw such suspicion on the respondents as that the court is bound to enter a decree for complainants (p. 56).

* * * * * * *

"Without commenting on the sufficiency of this excuse (of defendants for not introducing evidence) under the peculiar circumstances of the case, we desire to state with reference to the testimony introduced by complainants that it is indeed meager and in the extreme unsatisfactory. In fact, during the hearing we at times were annoyed at the very evident appearance of fear or evasion shown by the witnesses called, and at other times felt a sort of sympathy for complainants in their efforts to bring out the truth, as we thought, against every obstacle that could be put in their way. This belief was strengthened when we noticed that several important witnesses were unaccountably absent and several others, instead of responding to process, sent in physician's certificates alleging their inability to be present. In spite of this feeling, a thorough examination of the record, and the cold law, in the light of all the surrounding circumstances, has driven us back to a consideration of the whole case from as impartial a point of view as we are capable of (p. 57).

* * * * * * *

"To tell the truth, complainants manifestly failed in their proof in this regard. Their testimony is so piece-meal, and so uncertain even when drawn from the witnesses introduced by a cross-examination by counsel for complainants who introduced them, and is in and of itself so unsatisfactory as a basis for asking a court to disturb a vast amount of title as to make us falter at the proposition, while at the same time it leaves in our mind an unsatisfied feeling as to the honesty of the transaction and the good faith of respondents" (p. 58, top).

From these quotations it would seem that the judge held it to be incumbent upon complainants not only to prove each and every allegation of their bill, whether vital or incidental, but also to prove them by evidence as direct and conclusive as in other classes of cases. Yet courts have always made a distinction in the character of proof required in cases involving fraud, holding that suspicious circum-

stances should be carefully considered, as fraud is always a creature of darkness and secrecy, and where the proof of complainants, circumstantial though it may be, leads to doubt of good faith, defendants should be required to offer explanatory proof or suffer the doubt to turn into a presumption against them.

Crawford *vs.* Neal, 144 U. S., 585, 595.
Schaferman *vs.* O'Brien, 28 Md., 365.
Beidler *vs.* Crane, 135 Ill., 92, 98.
Leeper *vs.* Bates, 85 Mo., 224.
Dabezies *vs.* Barthe, 104 La., 781.

Notwithstanding the opinion of the judge that complainants' proof was fragmentary and unsatisfactory—"scraps," as he called it—the findings subsequently made (pp. 67-69) include the following facts:

The ninth finding states that the indebtedness of Tornabells and Co. to complainants existed before the alleged fraudulent conveyance was named.

The second finding states that defendants elected at the conclusion of complainants' evidence to stand upon its alleged insufficiency and not to introduce evidence in their own behalf.

The fourth and fifth findings state that the conveyance in controversy was made by Tornabells & Co. to Aran for a consideration of 197,700 pesos, which was to be paid about fifteen per cent in cash and the balance in equal yearly installments extending over ten years without interest and without security for its payment, and that the conveyance covered practically all the assets of the grantor firm.

The sixth and seventh findings state that nine days after the above conveyance Aran made two mortgages on the bulk of this property for an aggregate sum of 150,000 pesos, of which 130,000 were payable in ten annual installments of 13,000 pesos each, for which notes were given by Aran in favor of Duran, who was a cousin of Tornabells.

This mortgage was recorded May 24, 1900 (finding 8), while the anterior deed from Tornabells to Aran was not recorded until the 31st day of August thereafter (Opinion of Judge, p. 51, 3d par.).

The tenth finding states that, although Aran had on or before September 13, 1901, obtained a receipt in full from Tornabells and Co., for the payment of the purchase price which was to run ten years (Opinion of Judge, p. 51, 4th par.) he executed a mortgage on a part of this same property in June, 1902, to secure to the Banco de Soller the payment of an old debt of Tornabells & Co., for 32,780 pesetas (6,556 pesos), but declined to assume any personal liability for the payment of the same.

The eleventh finding states that in 1903, Aran was in possession of some of the mortgage notes which he had given Duran, and which were not yet due; that Aran used said notes as collateral with the defendant firm of Fritze, Lundt & Co., for his account with them for supplies furnished for the cultivation of this same property which previously belonged to Tornabells & Co.; and that when this account amounted to $16,600 that firm took a mortgage on one of the properties involved in this controversy and turned the notes back to Aran. In this mortgage also Aran stipulated that he should not be personally liable for the debt.

The twelfth and thirteenth findings cover two other transactions involving portions of the property in controversy, in neither of which did the notary signing the deed certify to any money having been paid in his presence—therefore said deeds were not even *prima facie* proof that any consideration had really been paid.

Upon these findings we submit the following propositions:

First. The fact that the conveyance to Aran included practically all of the assets of the firm of Tornabells and Co. differentiated the transaction from any in the ordinary course of business, and hence was *prima facie* proof of a fraudulent intent on the part of both parties thereto, and

it was the duty of the court upon finding that fact alone to grant complainants relief.

Walbrun *vs.* Babbit, 16 Wall., 677.
Dent *vs.* Ferguson, 132 U. S., 50, 62.
Judson *vs.* Currier Co., 15 Fed. Rep., 541.
Chevalier *vs.* Commins, 106 Cal., 580.
Note, subd. VII, 32 L. R. A., 33, 58.

This court said in the case of Walbrun *vs.* Babbit, *supra:*

> "But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase" (citing authorities).
>
> "The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose."

Second. The conveyance being thus presumptively fraudulent between the parties, any subsequent purchaser or party acquiring an interest in property so conveyed has the burden of proving by affirmative evidence the *bona fides* of his title or interest.

Crawford *vs.* Neal, 144 U. S., 585.
Callan *vs.* Stathan, 23 How., 477, 480.
Nickerson *vs.* Meecham, 14 Fed. Rep., 881, 885.
Bartles *vs.* Gibson, 17 Fed. Rep., 293, 297.

Third. The defendants having introduced no affirmative evidence, and the character of the conveyance making it presumptively fraudulent, the finding by the court that the deed recited a full consideration will not warrant the conclusion that the transaction was valid. Where the con-

sideration is attacked for fraud the recital in the deed is not sufficient evidence thereof.

Coal Company *vs.* Doran, 142 U. S., 417, 438.

This court in the above case used the following language:

> "The coal company insists, however, that it occupies the position of a *bona fide* purchaser for value without notice, and as such is entitled to the protection of the Court. No evidence whatever was adduced on behalf of the defendant, and although George W. Belcher, N. L. Reynolds and P. H. Rorer answered under oath, they were not required to do so, and their answers were not evidence in their favor, under the amendment to the 41st rule in equity. * * * None of the original deeds in appellant's chain appear to have been produced on the hearing, though certified copies were attached to the pleadings, but no independent evidence was adduced of the payment by any of the defendants of any money whatever. As against complainant the recitals in these deeds cannot be relied on as proof of the payment of the purchase money (citing several cases). Apart from this we hold appellant chargeable with notice," etc.

Fourth. The fraud in the transaction being proven, not even the actual payment of full value will protect a purchaser unless he also prove his *bona fides.*

Clements *vs.* Moore, 6 Wall., 312.

Morrow Shoe Co. *vs.* N. E. Shoe Co., 6 C. C. A., 508, 520.

Moore *vs.* Crawford, 130 U. S., 122.

Note, subd. III, 32 L. R. A., 33, 40.

In Clements *vs.* Moore, *supra,* this court said:

> "The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."

Fifth. The findings as to the subsequent conveyances of the property in controversy by Aran show sufficient to convince any court that at least some of said conveyances were made for the benefit of the firm of Tornabells & Co., presumably to buy off certain creditors who had too much knowledge of the real transaction, and were threatening to make trouble.

The transactions with Banco de Soller and Fritze, Lundt & Co. both appear to have involved the settlement of the claims against the old firm, although Aran was supposed to have closed up his transaction with Tornabells in September, 1901, while these transactions were practically one and two years subsequent thereto; and the refusal of Aran to assume personal liability is very significant.

The fact that Aran in the latter transaction was using some of the notes which he was supposed to have given Duran, although such notes should have been cancelled if he had really paid them off, is also very instructive.

Sixth. By the weight of authority, the fact that the sale was not for cash, but on long time and without security also in itself makes it presumptively fraudulent.

Point VII.

The decree of the court below should be reversed and the cause remanded with directions to enter a decree for complainants.

We contended below upon the pleadings and evidence, and we contend here upon the pleadings and findings, that the court committed each error assigned. But by the commission of any one of the stated errors the complainants were vitally prejudiced, and the decree should be reversed.

Respectfully submitted,

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